Chen Beng Kwee v St Microelectronics Sdn Bhd (formerly known as SGS-Thomson Microelectronics Sdn Bhd) & Anor

HIGH COURT (MUAR) — CIVIL SUIT NO 13–05–06 OF 2011
UMI KALTHUM J
13 MARCH 2012

Civil Procedure — Judicial review — Certiorari — Employee applied to quash Industrial Court's decision holding his dismissal valid — Whether decision irrational or unreasonable — Whether court considered all relevant facts and omitted irrelevant facts — Whether charge on which employee dismissed clear and specific enough for him to defend himself — Whether Industrial Court right to refuse to interfere with decision to dismiss employee

The applicant, who was a senior production supervisor with the first respondent, was dismissed from service by the company after it found him guilty of having behaved inappropriately towards one of his female subordinates ('COW3') while at work. The company held a domestic inquiry ('DI') where the applicant was required to answer the charge he had sexually harassed COW3 in that he had caressed her hips, held her hands, invited her out on several occasions and also proposed that she be his mistress. The applicant's dismissal was referred to the Industrial Court ('the second respondent') which found there was just cause and excuse for the dismissal. In his instant application to the High Court for an order of certiorari to quash the second respondent's decision the applicant submitted that the decision was irrational and unreasonable; that the Industrial Court failed to consider the charge framed against him in the DI was defective and that even if misconduct was proven, the punishment of dismissal was not justified.

Held, dismissing the application with costs:

(1) The Industrial Court had very much considered the applicant's complaint that the charge was vague but nevertheless concluded that it was sufficiently clear and specific to enable the applicant to defend himself. The charge was clear as to the nature of the sexual harassment committed and also as to when and where it took place and the parties who were involved (see para 13).

(2) The findings of the second respondent were not irrational or unreasonable. The Industrial Court had taken into account relevant facts and not irrelevant ones. It concluded that COW3 was a credible witness since the applicant could not prove she had any ill-intentions in making the allegations against him. The applicant also testified he did touch her

hand in circumstances which did not require him to do so. The court had not taken into account irrelevant facts by referring to an earlier incident to establish the fact that, by his own admission, the applicant had inappropriately touched COW3, which gave credence to her testimony that he had caressed her hips (see paras 16, 17 & 20).

(3) The Industrial Court was correct to refuse to intervene on the punishment of dismissal and did not commit a jurisdictional error in refusing to intervene (see paras 23 & 24).

[Bahasa Malaysia summary

Pemohon, penyelia kanan pengeluaran dengan responden pertama, diberhentikan daripada perkhidmatan oleh syarikat selepas didapati bersalah setelah berkelakuan tidak sopan terhadap pekerja wanitanya ('COW3') semasa bekerja. Syarikat mengadakan siasatan domestik ('SD') di mana pemohon dikehendaki untuk menjawab tuduhan gangguan seksual terhadap COW3 di mana dia mengusap pinggulnya, memegang tanggannya, mengajak dia keluar beberapa kali dan juga menawarkan dia menjadi wanita simpanannya. Pembuangan kerja pemohon dirujuk ke Mahkamah Perusahaan ('responden kedua') yang mendapati terdapat sebab dan alasan untuk pembuangan kerja. Dalam permohonan ini ke Mahkamah Tinggi untuk perintah certiorari membatalkan keputusan responden kedua pemohon berhujah bahawa keputusan adalah tidak rasional dan munasabah; bahawa Mahkamah Perusahaan gagal untuk mempertimbangkan tuduhan yang dikenakan terhadapnya dalam SD adalah cacat dan bahawa walaupun salahlaku dibuktikan, hukuman pembuangan kerja tidak berjustifikasi.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah Tinggi telah mempertimbangkan aduan pemohon dengan teliti bahawa tuduhan adalah samar-samar tetapi walau bagaimanapun memutuskan bahawa adalah cukup jelas dan spesifik untuk membolehkan pemohon membela dirinya sendiri. Tuduhan tersebut adalah jelas terhadap sifat gangguan seksual yang dilakukan dan juga terhadabila dan di mana ia berlaku dan pihak-pihak yang terlibat (lihat perenggan 13).

(2) Dapatan responden kedua adalah rasional dan munasabah. Mahkamah Perusahaan telah mengambil kira fakta-fakta relevan dan tidak relevan. Ia memutuskan bahawa COW3 adalah saksi yang boleh dipercayai memandangkan pemohon tidak dapat membuktikan yang dia mempunyai niat jahat dalam membuat dakwaan-dakwaan terhadap pemohon. Pemohon juga memberi keterangan yang dia tidak menyentuh tangannya dalam keadaan yang tidak memerlukan dia berbuat demikian. Mahkamah tidak mengambil kira fakta-fakta tidak relevan dengan merujuk kepada kejadian sebelumnya untuk

membuktikan fakta bahawa dengan pengakuannya sendiri, pemohon telah secara tidak sopan menyentuh COW3, yang mana memberi kredibiliti kepada testimoninya bahawa dia mengusap pinggulnya (lihat perenggan 16, 17 & 20).

(3) Mahkamah Tinggi betul untuk menolak daripada campur tangan atas hukuman pembuangan kerja dan tidak melakukan kesilapan bidang kuasa dalam menolak daripada campur tangan (lihat perenggan 23 & 24).]

Notes

For cases on certiorari, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4797–4798.

Cases referred to

Milan Auto Sdn Bhd v Wong Sen Yen [1995] 3 MLJ 537, FC (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & another appeal [1995] 2 MLJ 753; [1995] 3 CLJ 344, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 2, O 92 r 4

Teng Fong Lin (FL Teng & Co) for the plaintiff.
Manjeet Kaur Nijar (Nijar & Nijar) for the respondent.

Umi Kalthum J:

JUDICIAL REVIEW

[1] The applicant applied in encl 9 for a judicial review of the award handed down by the learned chairman of the Industrial Court Award 641 of 2011 dated 6 May 2011 ('the said award') and prayed for an order of certiorari to quash the said award.

[2] By the said award, the learned chairman held that the dismissal of the applicant by the first respondent was with just cause and excuse.

[3] Leave of this court was granted to the applicant on 4 August 2011. A

FACTS

[4] The applicant commenced his employment with the first respondent on or about 16 March 1984 as a production supervisor with a monthly salary of RM650. B

[5] On or about 21 August 2006, the applicant was informed by the human resources officers of the first respondent that his subordinate, one Cik Siti Hajar bt Razeman ('COWS') had lodged a complaint that he had misconducted himself vis COW3 on 18 August 2006 by making insinuating remarks to COW3 and touching COW3. The human resources officers asked the applicant to give a written statement and which he did. C

[6] On 22 August 2006, the applicant received a letter of charge alleging him of misconduct and requiring him to attend a domestic inquiry ('DI') on 25 August 2006. After the DI was conducted, with the participation of the applicant, the panel of the DI found the applicant guilty of all the charges and the applicant was dismissed with effect from 4 September 2006. At the time of his dismissal, the applicant was a senior production supervisor with a monthly salary of RM3,435. D E

[7] The applicant's dismissal was referred to the second respondent, which found that the applicant had been dismissed with just cause and excuse. F

[8] In the amended statement filed by the applicant (encl 20), the applicant had set out his grounds for applying for the judicial review. Based on the submission of both parties, the applicant's grounds can be broadly categorised as follows: G

(a) whether the second respondent had failed to consider the charge against the applicant was defective;

(b) whether the findings of the second respondent were irrational and or unreasonable and could not stand; and H

(c) whether the second respondent had acted without jurisdiction/ exceeded its jurisdiction when it failed to consider the punishment of dismissal was excessive.

I

DECISION

[9] I dismiss the applicant's application with costs at RM5,000. I do so for

the following reasons.

WHETHER THE SECOND RESPONDENT HAD FAILED TO CONSIDER THE CHARGE AGAINST THE APPLICANT WAS DEFECTIVE

[10] It was contended by the applicant that the second respondent had failed to consider that the charge against the applicant, in particular the charge that on 18 August 2006 the applicant was alleged to have touched the hip of COW3, was defective and thereby rendering the applicant unable to put up a proper defence.

[11] In order to understand the applicant's contention I reproduce the contents of the charge in the letter of charge dated 22 August 2006 (p 8, exh 'CBK5') as follows:

> On 21st August 2006, we had received a complaint against you by one of your operators Emp Id 109568 Siti Hajar Binti Razeman that on the 18th August 2006, you had caressed her hips while she was standing next to you filling up the 'overtime stay back form'. She had also claimed that you have invited her out on several occasions and also made insinuating remarks (proposing to her and asking her to be your mistress) and holding her hands. The above action tantamount to sexual harassment. As a supervisor you are accountable for the discipline in your area of responsibilities and therefore the company cannot accept your statement that you were joking with her. As such you are to answer to the following allegations:
>
> a) Immoral and improper behaviour towards your subordinate during working hours.
>
> b) Making insinuating remarks as mentioned above to her.

[12] Eventhough the DI was conducted, the learned chairman of the Industrial Court had ruled that the DI was flawed as one of the member of the panel of investigation into the allegations against the applicant, that is, COW5, was also the officer who had investigated the allegations before the DI was conducted. The learned chairman therefore refused to take into account the evidence tendered during the DI in order to determine whether or not the applicant's dismissal was with just cause or excuse (p 13, para 9, award). On the authority of the Federal Court case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & another appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344, the learned chairman then proceeded to evaluate the evidence tendered before the Industrial Court to determine whether the applicant's dismissal by the respondent was with just cause or excuse. So far I see no procedural impropriety had been committed by the learned chairman when he decided to ignore the evidence adduced at the DI and instead evaluated the evidence adduced at the trial before the Industrial Court.

[13] In para 12 of his award, the learned chairman did consider the issue raised by the applicant in the review. I quote at length the findings of the learned chairman:

> 12 Seterusnya, mahkamah meneliti hujahan pihak menuntut yang menyatakan bahawa pertuduhan yang diberikan kepada beliau adalah tidak jelas dan kabur. Ini menyebabkan pihak menuntut sukar membuat pembelaan kepada tuduhan tersebut. Jika diteliti kepada surat tunjuk sebab yang dikemukakan kepada pihak menuntut di eksh S1 di ms 21 ikatan pliding, mahkamah mendapati bahawa, maklumat-maklumat asas kepada kejadian gangguan seksual yang dilakukan oleh pihak menuntut telah dinyatakan dengan jelas di dalam kertas pertuduhan tersebut. Tiada keterangan yang menunjukkan bahawa makluman tersebut tidak membolehkan pihak menuntut membuat pembelaan yang sewajarnya. Ini adalah kerana jenis kesalahan telah dinyatakan di dalam kertas pertuduhan tersebut. Begitu juga tarikh dan tempat kejadian. Mahkamah berpendapat pihak responden tidaklah dikehendaki menyatakan secara terperinci fakta-fakta dalam pertuduhan tersebut kerana ia akan dikemukakan semasa perbicaraan. Apa yang lebih penting ialah maklumat-makumat asas berkenaan pertuduhan sudah dinyatakan dalam kertas pertuduhan tersebut. Ia adalah memadai kerana kertas pertuduhan hanyalah bertujuan untuk memaklumkan kepada pihak menuntut apakah kesalahan yang dilakukan dan di manakah ianya dilakukan serta bilakah ianya dilakukan.

From the said quotation, I find that the learned chairman had not only very much considered the applicant's complaint on the charge being vague but had nevertheless concluded that the charge against the applicant was sufficiently clear and specific to enable the applicant to defend himself. I agree with his observations and findings. There was a date stated in the charge on when one/several of the incidents of sexual harassment had taken place, that is, 18 August 2006. There was a specific reference to 'sexual harassment' in the charge and the nature of the 'sexual harassment' was also indicated, that is:

(a) 'you had carassed her hips while she was standing next to you filling up the 'overtime stay back form';

(b) 'you have invited her out on several occasions and also made insinuating remarks (proposing to her and asking her to be your mistress)'; and

(c) 'holding her hands'.

The time was referred to as 'during working hours', which must also necessarily mean the place of the occurrence of the said incidents was in the respondent's premises, that is, the workplace of the applicant and COW3.

[14] In the premises I dismiss this ground as having no merits.

WHETHER THE FINDINGS OF THE SECOND RESPONDENT WERE IRRATIONAL AND OR UNREASONABLE

[15] It was submitted by learned counsel for the applicant that the second

respondent had not taken into account relevant facts and took into account irrelevant facts as follows:

(a) COW3 was not telling the truth/contradicting herself on several occasions as when —

(i) she said she was so traumatised she did not work, but that her learned counsel had informed the court that she was working and could not get leave on the hearing which was scheduled for 8 September 2009;

(ii) that she saw the applicant touched her, which contradicted her statement during the DI, that she did not see the applicant touch her but felt his hand;

(iii) during cross-examination, she did not agree that the door to the room was not locked. This fact was not stated during the DI; and

(iv) she was recording the overtime form when she alleged the applicant touched her. She did not leave immediately but still managed to finish recording the form before she ran out;

(b) COW4's testimony that she saw the applicant at the place of incident contradicted her evidence at the DI when she informed the panel that she did not see the applicant at the place of incident;

(c) COW5 was evasive in her answers; and

(d) the applicant was refused the minutes of the inquiry although he had requested for it and it was only given to him four days before trial.

[16] Having perused the learned chairman's award, I am of the view that he did take into various contradictions of COW3's testimony and had mentioned some of them, albeit he did not mention those raised by the applicant. He nevertheless came to the conclusion the COW3 was a credible witness since the applicant could not prove any ill intentions of COW3 towards the applicant when making the allegations against the applicant. The learned chairman then made the following findings at paras 20–22 of the said award:

> … Semasa pemeriksaan balas ke atas COW3, tiada sebarang cabaran diberikan kepada kebolehpercayaan COW3 mengenai kejadian Pihak Menuntut telah mencuit beliau pada hari kejadian. *COW3 juga tidak dapat ditunjukkan oleh pihak menuntut mempunyai niat yang buruk terhadap pihak menuntut sehingga melemparkan tuduhan bahawa beliau telah dilakukan gangguan seksual oleh pihak menuntut. Oleh kerana keterangan COW3 dan kebolehpercayaannya tidak dapat dipertikaikan oleh pihak menuntut, maka mahkamah berpendapat COW3 adalah saksi yang boleh dipercayai (credible).* Seterusnya, mahkamah harus meneliti adakah keterangan sokongan yang menyokong keterangan COW3 mengenai insiden tersebut. Saksi yang paling hampir yang sepatutnya menyokong COW3 adalah COW4 namun COW4 tidak boleh mengesahkan kejadian tersebut kerana beliau

tidak nampak kejadian tersebut dan hanya berdasarkan kepada makluman yang diberikan oleh COW3 kepada beliau sejurus selepas COW3 dikatakan telah mengalami gangguan seksual oleh pihak menuntut. Oleh itu, keterangan COW4 tidak boleh dijadikan keterangan sokongan kepada keterangan COW3. Ini bermakna, dakwaan COW3 bahawa pihak menuntut telah melakukan gangguan seksual hanyalah merupakan keterangan beliau semata-mata. Sementara pihak menuntut dalam keterangannya pula menafikan bahawa beliau telah melakukan gangguan seksual kepada COW3. Ini bermakna keterangan yang ada di hadapan mahkamah ialah keterangan COW3 yang dinafikan oleh pihak menuntut. Persoalannya ialah adakah keterangan COW3 ini dapat membuktikan bahawa telah berlaku gangguan seksual pihak menuntut ke atas beliau?

21 Namun demikian, mahamah juga perlu meneliti keterangan pihak menuntut yang tidak menolak fakta bahawa beliau ada mencuit COW3. Tindakan pihak menuntut itu adalah disebabkan beliau ingin menarik perhatian COW3 kerana keadaan semasa itu di tempat kejadian adalah bising. COW4 dalam keterangannya juga bersetuju bahawa keadaan di tempat kejadian tersebut adalah bising dan sempit. Ini menunjukkan bahawa keterangan pihak menuntut berkenaan tempat kejadian itu disokong oleh COW4. Apa yang menjadi persoalan di sini ialah adakah alasan pihak menuntut mencuit COW3 dalam keadaan bising di tempat kejadian itu sebagai sesuatu tindakan yang wajar dilakukan? Adakah tiada cara lain untuk pihak menuntut menarik perhatian COWS pada masa itu? Adakah maklumat yang perlu disampaikan oleh pihak menuntut kepada COW3 begitu penting sehingga menyebabkan beliau terpaksa mencuit COW3? Adakah keadaan semasa itu suatu kecemasan yang memerlukan pihak menuntut bertindak sedemikian rupa terhadap COW3? Sekiranya terdapat keterangan yang menunjukkan bahawa pada masa kejadian tersebut ada kecemasan, sudah pasti tindakan pihak menuntut mencuit COW3 ketika itu adalah sesuatu yang wajar. Selain dari itu, sekiranya benar pihak menuntut ingin menarik perhatian COWS mengenai sesuatu yang ingin disampaikan kepada COW3 maka pihak menuntut boleh menggunakan cara yang lain tanpa mencuit atau menyentuh COW3.

22 Pada masa yang sama, mahkamah juga mengambil perhatian kepada keterangan pihak menuntut yang menunjukkan bahawa beliau tidak mempunyai niat untuk melakukan gangguan seksual kepada COW3 tetapi sekadar mencuit COWS sahaja …

Sekiranya mahkamah mengambil kira penjelasan pihak menuntut mengenai tindakan beliau mencuit COW3 dalam kes ini, ia masih tidak dapat menunjukkan bahawa pihak menuntut tidak mempunyai niat untuk melakukan gangguan seksual kepada COW3. Ia berdasarkan keadaan tempat kejadian dan tiada keperluan untuk pihak menuntut mencuit COW3 dalam kes ini. Ia bukan berada di dalam keadaan kecemasan yang memerlukan pihak menuntut mencuit COW3.

Oleh itu, dalam konteks kes ini, *mahkamah berpendapat keterangan COW3 mengenai kejadian gangguan seksual oleh pihak menuntut dan keterangan pihak menuntut sendiri mengesahkan bahawa terdapat tindakan pihak menuntut mencuit COW3. Ini bermakna keterangan gangguan seksual tersebut telah dibuktikan oleh pihak responden melalui keterangan COWS dan pihak menuntut sendiri. Ini bermakna pihak responden telah pada tahap perimbangan kebarangkalian membuktikan salah laku pihak menuntut.*

(Tekanan ditambah.)

From the said quotation, the learned chairman was satisfied with COW3's testimony that the applicant had sexually harassed her when he caressed her in the frame room in view of the fact that the applicant had testified that he did touch her hand (Q & A6, applicant's witness statement, exh CBK3), which he later in Q & A7 stated to have just 'tapped her twice on her hand to catch her attention as it is very noisy in that area', 'tapped her twice on her hand somewhere below her elbow', in circumstances which did not require the applicant to do so. Further, the applicant had agreed that touching a woman physically was something that was not appropriate, and touching a Muslim girl was something physically offensive. This incident took place on 18 August 2006. In the circumstances I see no reason to disturb the said findings of facts by the learned chairman.

[17] Learned counsel for the applicant submitted that the second respondent had taken into account irrelevant facts of an act prior to the alleged incident instead of focusing on the incident that was alleged to have occurred at 6.50pm on 18 August 2006. I disagree with the said learned counsel submission. The learned chairman did refer to the incident allegedly occurring at 6.50pm on 18 August 2006 — see paras 13–16. The learned chairman had referred, to the earlier incident to establish the fact that by his own admission, the applicant had inappropriately touched COW3, which gave credence to COW3's testimony that the applicant had carassed her hips.

[18] As for the second respondent not considering/giving effect to the evidence adduced in court that the applicant had already clocked out at the time of the alleged incident, it must be remembered that COW3 was doing overtime and at that point in time the applicant was still at the work place.

[19] With regard to whether the 'mencuit'/'tapping' incident constituted sexual harassment, the learned chairman in the first place had amply considered what constituted sexual harassment before making his finding. In finding that incident to have constituted sexual harassment, I find the learned chairman did consider all the circumstances surrounding the incident and to have come to that conclusion. Since the learned chairman had heard the witnesses and observed their demeanour, I would not want to disturb his finding of fact where this is concerned.

[20] For the reasons stated in paras 15–20 above, I find that the findings of the second respondent were not irrational nor unreasonable and that he had taken into account relevant facts and did not take into account irrelevant facts. I therefore dismiss this ground for review as having no merits.

WHETHER THE SECOND RESPONDENT HAD ACTED WITHOUT JURISDICTION/EXCEEDED ITS JURISDICTION WHEN IT FAILED TO CONSIDER THE PUNISHMENT OF DISMISSAL WAS EXCESSIVE

[21] It was contended by learned counsel for the applicant that the second respondent had failed to consider whether the misconduct of the applicant, if proven, justified dismissal of the applicant. The Federal Court decisions of *Milan Auto Sdn Bhd v Wong Sen Yen* [1995] 3 MLJ 537 and *Wong Yuen Hock* were referred as her authorities.

[22] On his part, the learned chairman had, after considering the submissions of both parties, stated (at p 41 of the said award) that:

> Berdasarkan kepada hujahan di atas, adalah didapati bahawa pihak menuntut menyatakan bahawa hukuman yang dikenakan oleh pihak responden kepada pihak menuntut adalah tidak sepadan dengan kesalahan yang dilakukan dan tempoh masa perkhidmatan beliau dengan syarikat. Ia seolah-olah mencadangkan supaya agar mahkamah mempertimbangkan untuk menggantikan hukuman yang telah dikenakan oleh pihak responden kepada pihak menuntut. Adalah menjadi prinsip undang-undang yang termaklum bahawa mahkamah tidak akan campur tangan dalam keputusan yang diberikan oleh majikan kepada pekerjanya yang telah disabitkan dengan kesalahan salah laku.

The learned chairman then went on to refer to the Federal Court cases *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 as well as the minority decision of the Court of Appeal in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771, which was approved by the Federal Court in *Ng Hock Cheng* as his authorities. He then concluded (at p 43, award):

> Dalam kes ini, mahkamah mendapati tiada alasan untuk mahkamah ini campur tangan di dalam keputusan pihak responden menamatkan perkhidmatan pihak menuntut. Jika mahkamah mengganggu keputusan majikan ia telah memberikan gambaran bahawa mahkamah menentukan apakah sewajarnya dilakukan oleh majikan kepada pekerjanya yang telah melakukan salah laku. Ini adalah kerana hanya majikan yang mengetahui apakah hukuman dan tindakan yang sewajarnya diambil kepada para pekerja mereka yang terlibat dalam salah laku. Jika mahkamah melakukan sedemikian, ia telah melewati tugas mahkamah dalam kes ini bagi menentukan sama ada pembuangan kerja pihak menuntut adalah adil dan beralasan seperti yang dinyatakan dalam rujukan ke mahkamah ini. Pada masa yang sama, mahkamah juga sedar mengenai peruntukan di bawah s 30(5) Akta Perhubungan Perusahaan 1967 … Namun demikian, mahkamah berpendapat dalam kes ini, ia tidak boleh digunakan bagi mengubah keputusan majikan mengenai hukuman yang wajar dikenakan kepada pihak menuntut.

[23] The learned chairman, in not so many words, had considered whether he needed to intervene in the matter of the dismissal of the applicant or not by referring to both parties' submission on the matter, but had nevertheless declined to intervene. He thought it best to leave it to the decision of the first respondent who would be in the best position to assess and decide on the matter.

[24] I see no reason to disturb the stance taken by the learned chairman in refusing to intervene on this issue and I find the learned chairman had not committed a jurisdictional error in refusing to do so. The learned chairman was correct in refusing to do so based on the decision of the Federal Court in *Ng Hock Cheng*. Peh Swee Chin FCJ, in delivering the court's decision, ruled that (at p 411 para f–i):

> It should be emphasised in order to avoid confusion, that the said question for which leave to appeal to this court was granted was in truth as to whether the High Court had the jurisdiction or power to vary any penalty imposed by the Public Services Commission as contradistinguished from another related but no longer important question for the purpose of the instant appeal of whether the appellant had or had not been guilty of any misconduct which could render him liable in the first place to any penalty or punishment as provided by the said general orders.
>
> After the High Court had judicially reviewed and upheld the disciplinary authority's finding of misconduct or breach of any provision of the code of conduct under the said general orders, in regard to any further and consequential order of punishment or penally as prescribed by the 'General Orders' aforesaid and imposed on the public officer in question, *the High Court was right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order. The Court of Appeal was also right for not interfering with the same for reasons which we will discuss as follows.*

(at p 412, para a–h):

> A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution … *If the public officer succeeds in so impugning, any order of punishment incuding on order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remain and there should be no further review on such order of punishment.*
>
> *To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee.* After all is said and done, persons in the public service categorised under art 132 of the Federal Constitution are in fact employees.

> Then again there is the elementary principle that a court will not normally decree a specific performance of a contract of personal service or its terms thereof. *After a court intervenes by judicial review the question of the alleged disciplinary breach, the court should thereafter give due respect to this principle on the question of penalty …*
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> *It must be borne in mind that when a court declares as void an order of dismissal against a public officer categorised under art 132 of the Federal Constitution … it does so because the accusation against him on which such an order of dismissal is based, has been found to be invalidly made or conducted, so that the order of dismissal, and for that matter, any other order of penalty is thereby a non sequitur. The court in truth is not substituting the order of dismissal with its own measure of punishment and if in the latter case, it would amount to the court forcing the employer/government to still employ him, or specifically enforcing a contract of personal service …*

(at p 413, para c–d):

> … Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, *in a similar vein, an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee.*
>
> Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng* cannot stand though we express our agreement with the minority judgment on the same narrow point.
>
> (Emphasis added.)

PROCEDURAL NON-COMPLIANCE

[25] It was submitted by learned counsel for the applicant that save for the averment that the second respondent came to his conclusion based on fact and what the applicant did was serious, the first respondent had not replied to the applicant's averments. She had proceeded to list out the applicant's averments which she contended were not replied to by the second respondent. That based on the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, which held that 'the normal rule of pleadings applies so that it is necessary that material averments of fact in the return, must either affirm or deny the allegations made in the affidavit filed in support of the petition, and such averments, if not denied in the return, must be taken to have been accepted'.

[26] Learned counsel for the first respondent on the other hand submitted that for the purposes of a review, the entire record of proceedings of the Industrial Court should be before this court. That in the first respondent's affidavit in reply, para 3, the first respondent had raised the issue that the proceedings in this matter were incomplete viz the bundle of pleadings, the bundle of documents of both parties, the witness statements of witnesses of both parties were not exhibited in the application and that therefore the application was not in order and is incomplete.

A **[27]** Strictly speaking, I agree to both learned counsel's submissions on the omissions by both parties to observe the niceties of civil procedure and the resulting effects of these omissions. But in the interest of justice I have chosen to ignore these omissions as being essentially of a technical nature and have instead addressed my mind on the substantive issues raised (see O 1A, O 2,
B O 92 r 4 of the Rules of the High Court 1980).

Application dismissed with costs.

C Reported by Ashok Kumar

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